Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

JOHN A. LAWSON
and
SPANISH COVE SANITATION, INC. PETITIONERS

v.

UNITED STATES OF AMERICA RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, IN A CRIMINAL PROCEEDING UNDER THE CLEAN WATER ACT, 33 U.S.C. §1251, ET SEQ., THE DISTRICT COURT HAS JURISDICTION TO ENTER JUDGMENT WHERE A UNITED STATES ATTORNEY INSTITUTED THE PROCEEDINGS WITH NO PRIOR REQUEST FROM THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY.

II. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN REFUSING TO REVERSE THE TRIAL COURT'S ORDER EXCLUDING FROM EVIDENCE CLEAR PROOF OF SELECTIVE AND VINDICTIVE PROSECUTION.

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The opinion of the United States Court of Appeals for the Sixth Circuit is cited as Numbers 94-6508 and 94-6509 (6th Cir. 1996) and is set forth in this Appendix at App-1.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 28, 1996. (App-1) Petition for Rehearing was denied on August 20, 1996. (App-13) This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Clean Water Act, 33 U.S.C. § 1366, provides in pertinent part:

> § 1366. Appearance
>
> The Administrator [of the Environmental Protection Agency] shall request the Attorney General to appear and represent the United States in any civil or criminal action instituted under this chapter to which the Administrator is a party.

The Clean Water Act, 33 U.S.C. § 1251(d), provides:

§ 1251. Congressional declaration of goals and policy

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called 'Administrator') shall administer this chapter.

The Clean Water Act, 33 U.S.C. § 1342(i), provides:

§ 1342. National pollutant discharge elimination system

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

STATEMENT OF THE CASE

Petitioner John A. Lawson is the president and principal shareholder of Spanish Cove Sanitation, Inc. [Spanish Cove], Petitioner. Spanish Cove is a Kentucky corporation which owns a small wastewater treatment facility located in Jefferson County, Kentucky.

Spanish Cove is operated under the direction and authority of the Environmental Protection Agency [EPA] and the Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet [the

Commonwealth], pursuant to the National Pollutant Discharge Elimination System [NPDES], 33 U.S.C. §1342, and the Kentucky Pollutant Discharge Elimination System [KPDES], KRS 224, respectively. Spanish Cove holds permit number KY0039802 under the Kentucky law. Under its permit, Commonwealth and Federal law, Spanish Cove is required to, and regularly has, submitted monthly discharge monitoring reports which state truthful accounts of the levels of various effluents discharged from the Spanish Cove plant. During all times relevant to this proceeding, Petitioners were actively working with officials from the Commonwealth to bring Spanish Cove into full compliance with the permitted levels of effluent discharge.

In August, 1992, Assistant United States Attorney Randy Ream notified Petitioners of his intention to seek grand jury indictment against them regarding alleged violations of 33 U.S.C. §1319. At no time were the Petitioners contacted by the Commonwealth or the EPA regarding the possibility of criminal charges under the Clean Water Act. Of his own authority, AUSA Ream informed Petitioners that to avoid indictment, they would be required to enter a plea of guilty to three violations of 33 U.S.C. §1319. Following entry of the plea, a fine would be determined and a redesign of the Spanish Cove facility ordered. AUSA Ream offered no guidance as to the level of the fine or the cost of redesign. (App. 34) Petitioners refused.

On February 2, 1993, under the supervision of AUSA Ream, the grand jury returned indictment number CR93-00015-L(M), charging Petitioners with seventeen counts of violating of 33 U.S.C. §§ 1311(a), 1319(c)(1)(A) and (c)(2)(A). (App. 15) The indictment was based entirely upon the discharge monitoring reports which

Petitioners were required to submit to the Commonwealth under the KPDES program.

Prior to trial, Petitioners offered proof of literally thousands of violations of the KPDES permit effluent discharge levels which resulted in no criminal prosecution. The United States was unable to produce evidence of even a single criminal prosecution brought in the Commonwealth, despite the thousands of violations. The trial court granted the United States' motion in limine to exclude Petitioner's evidence of the other non-prosecuted violators, apparently in reliance upon the United States offer of two prior civil matters which had been prosecuted through the Department of Justice's Louisville office at the request of the EPA.

At the trial of this matter, the United States offered no proof of actual environmental harm from the effluent discharge at Spanish Cove. The jury returned a verdict of guilty on fourteen of the seventeen counts alleged in the indictment. On November 8, 1994, the United States District Court for the Western District of Kentucky entered judgment against the Petitioners and sentenced Mr. Lawson to serve six months in prison. The Sixth Circuit Court of Appeals affirmed as to all matters except the imposition of a fine, upon which issue it reversed. Resentencing on the fine has been stayed by the district court pending the exhaustion of Petitioners right to appeal.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT HAS NO JURISDICTION TO ENTER JUDGMENT IN A CRIMINAL PROCEEDING UNDER THE CLEAN WATER ACT, 33 U.S.C. §1251, ET SEQ., WHERE A UNITED STATES ATTORNEY INSTITUTED CRIMINAL PROCEEDINGS WITH NO PRIOR REQUEST FROM THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY.

There is no clear precedent on this important issue.

In the absence of clear precedent, the Attorney General, acting through Assistant United States Attorneys, may usurp from the Administrator of the EPA [Administrator] the authority to bring criminal enforcement proceedings under 33 U.S.C. § 1319(c) to the detriment of the objectives of the Clean Water Act. The defect here is jurisdictional in that Congress has clearly and unambiguously placed enforcement authority, including criminal enforcement authority, within the discretion of the Administrator of the EPA.

The criminal provisions set forth in 33 U.S.C. §1319(c) are strict liability offenses carrying substantial fines and imprisonment. The Attorney General, acting through Assistant United States Attorneys, is without the technical and scientific expertise to determine when, and if, criminal sanctions are required in a particular case. Prior referral of criminal cases from the Administrator to the Department of Justice is the only means by which the

goals of the Clean Water Act can be accomplished. Congress set forth its goals in 33 U.S.C. §1251(a) which states, "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Subsequent to the Petitioner's prosecution, on March 31, 1995, the Administrator published an interim policy regarding criminal referrals to the Department of Justice (60 Fed.Reg. 16, 875). This interim policy is relevant to the current prosecution for two reasons. First, it presumes that the EPA has, and always has had, the sole authority to refer cases to the Department of Justice for prosecution. Second, it demonstrates that EPA enforcement policies will be utterly confounded unless the Clean Water Act's criminal provisions are authoritatively placed within the sole discretion of the Administrator. In relevant part, this interim policy states:

> Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement
> I. Background
> D. Principles for Voluntary Compliance
> The interim policy that EPA is announcing today is based on seven principles:
> 1. Self-policing by regulated entities can play a crucial role in finding, fixing and preventing violations.
> * * *
> 3. Regulated entities that self-police and that voluntarily disclose and self-correct violations in accordance with this policy should be assessed penalties that are consistently and predictably lower than penalties for those who do not.

4. Regulated entities that self-police and voluntarily disclose and self-correct violations in accordance with this policy should also not be recommended for criminal prosecution.

* * *

In United States v. Cargill, Inc., 508 F.Supp. 734, 740 (D.Delaware 1981), the United States, at the request of the EPA, sued under the Clean Water Act to enjoin a wastewater treatment facility for violations of its permit and to impose civil penalties for past violations. The district court expressed the difficulty caused by the uncertainty of the Act's enforcement provisions. The district court stated:

> The means prescribed by the [Clean Water] Act for implementing the primary goal of cleaning up the nation's waters reflects the Congressional intent to encourage cooperative federalism. However, the Act's imprecision in delineating the exact roles of the various participants has often done much to exacerbate federal/state tensions, as shown by the present case. See, EPA v. California, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976); Cleveland Electric Illuminating Co. v. EPA, 603 F.2d 1 (C.A.6, 1979); Save the Bay, Inc. v. Administrator of the EPA, [556 F.2d 1282 (C.A.5, 1977)]; American Iron and Steel Institute v. EPA, [526 F.2d 1027 (C.A.3, 1975)]; 'State/EPA Relations Severely Strained, General Accounting Office Report Says,' 11 Env.Rep. Current Developments 649 (August 29, 1980).

In bypassing the Administrator's authority to decide whether to prosecute criminally, AUSA Ream has created a great threat to an already strained system. The threat of federal criminal prosecution is a virtual guarantee that individual permit holders will refuse to incriminate themselves through their discharge monitoring reports. Self-policing by permit holders will fail.

An Act passed by Congress and signed by the President can limit the power previously granted the Attorney General to prosecute claims for the Government. United States v. California, 332 U.S. 19, 27, 67 S.Ct. 1658, 91 L.Ed. 1889, 1893 (1947). Limitations on the authority of the Department of Justice to proceed under the criminal laws require a clear and unambiguous expression of the legislative will. United States v. Morgan, 222 U.S. 274, 282, 32 S.Ct. 81, 82, 56 L.Ed. 198, 200 (1911).

The Clean Water Act of 1977, 33 U.S.C. §1366 contains such a clear and unambiguous expression of Congressional intent. This statute states:

> §1366. Appearance
>
> The Administrator shall request the Attorney General to appear and represent the United States in any civil or criminal action instituted under this chapter to which the Administrator is a party. Unless the Attorney General notifies the Administrator within a reasonable time, that he will appear in a civil action, attorneys who are officers or employees of the Environmental Protection Agency shall appear and represent the United States in such action.

Statutory language that an act 'shall' be carried out is generally regarded as mandatory. South Carolina Wildlife Federation v. Alexander, 457 F.Supp. 118, 130 (D.S.C. 1978); Greene v. Costle, 557 F.Supp. 1225, 1228-30 (W.D.Tn. 1983)(noting that Congress uses the terms "may" and "authorized" in the Clean Water Act, but not interchangeably with "shall.") In bringing this criminal action, AUSA Ream was acting without prior request from the Administrator.

The criminal provisions of 33 U.S.C. §1319(c) are within Title 33 U.S.C., Chapter 26 - Water Pollution Prevention and Control. Congress clearly and unambiguously placed the authority to administer the criminal provisions within the sole authority of the Administrator under 33 U.S.C. §1251(d), which states:

> §1251. Congressional declaration of goals and policy
> (d) Administrator of Environmental Protection Agency to administer chapter
> Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called the 'Administrator') shall administer this chapter.

The Clean Water Act establishes a system of concurrent jurisdiction between the Federal and State authorities to apply and enforce the provisions of the Act. United States v. Cargill, Inc., 508 F.Supp. 734, 736 (D.Delaware 1981). Among the mechanisms for accomplishing the objectives of the Act is 33 U.S.C. §

1342, which permits the states to administer their own effluent discharge permit programs following approval of the state program by the EPA Administrator. At issue in the Petitioners' case is a violation of a permit issued under the Commonwealth's KPDES program. That Congress intended the jurisdiction over this program to be concurrently held between the states and the Administrator, as opposed to the Department of Justice, is clearly set forth in 33 U.S.C. § 1342(i). This statute states:

> § 1342. National pollutant discharge elimination system
> (i) Federal enforcement not limited
> Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

Congress' intent that either the State or the Administrator initiate criminal prosecutions under the Clean Water Act is evident from the legislative history of the legislation preceding the Clean Water Act of 1977, the Federal Water Pollution Control Act Amendments of 1972 (P.I 92-500; U.S. Congressional and Administrative News, p. 3809). Initially, the Senate bill required the Administrator to initiate civil actions or criminal proceedings. This requirement was modified by House Amendment to the extent that the Administrator is authorized, but not required, to bring civil or criminal proceedings. The House Amendment was adopted by Senate Conference. The House Amendment to Section 309 (33 U.S.C. §1319) states:

House Amendment

Section 309 is basically the same as the Senate bill except that the Administrator is authorized rather than required to initiate civil actions or criminal proceedings. Civil penalties cannot exceed $10,000 per day of violation, and criminal penalties cannot exceed $50,000 per day of violation and two years imprisonment.

Conference substitute

This is the same as the House amendment.

Senate Report Number 92-414, Section 309 - Federal Enforcement, presumes a scheme of Federal enforcement within the sole authority of the Administrator. In relevant part, the Senate report states:

> The Committee again, however, notes that the authority of the Federal Government should be used judiciously by the Administrator in those cases (sic) deserve Federal action because of their national character, scope, or seriousness. The Committee intends the great volume of enforcement actions be brought by the State. It is clear that the Administrator is not to establish an enforcement bureaucracy but rather to reserve his authority for the cases of paramount interest.
>
> * * *
>
> . . . . The Administrator retains, without qualification, the authority presently available under the Refuse Act to prosecute for unlawful discharges.

Decisions of the various Circuit Courts of Appeals and United States District Courts lend persuasive, but not decisive, authority on this issue. From these authorities, it is clear that the defect is jurisdictional.

In DuBois v. Thomas, 820 F.2d 943, 950 (8th Cir. 1987), the Court bifurcated its analysis of the Administrator's enforcement duties under the Clean Water Act into the duty to investigate and the duty to enforce. The Court of Appeals for the Eighth Circuit ruled that the duties of the Administrator to investigate violations were discretionary. DuBois, 820 F.2d at 948 (8th Cir. 1987). With regard to the duty to enforce, the Court emphasized that the statutory language regarding enforcement is not clear and, therefore, upheld the Administrator's interpretation that enforcement is discretionary. The Court stated:

> We believe that neither the language of § 309(a)(3) nor its legislative history can be said to evince a clear intent of Congress as to whether the enforcement duties of the Administrator are mandatory or discretionary. Under such circumstances, the Administrator's interpretation is a permissible construction of § 309(1)(3). That interpretation therefore must stand. Chevron [U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844-45.]
>
> We hold that the duties imposed on appellants by § 309(a)(3) of the FWCPA are discretionary. The district court should have dismissed the FWCPA claim against appellants for lack of subject matter jurisdiction.

In Commonwealth of Kentucky, ex rel. Hancock v. Ruckelshaus, 497 F.2d 1172, 1177 (6th Cir. 1974), the Sixth Circuit was called upon to interpret the enforcement provisions of the Clean Air Act, 42 U.S.C. §1857, et seq. There, the Commonwealth brought suit to compel the Administrator of the EPA to require various federal agencies operating air pollutant emitting equipment within the Commonwealth to seek a permit issued by the Commonwealth. The Sixth Circuit found, under the Clean Air Act, that there had been a waiver of sovereign immunity with respect to the Administrator and he could be so compelled if the decision to enforce the Clean Air Act was mandatory, rather than discretionary. The Sixth Circuit ruled:

> The district court correctly held that it had no power to review the decision of EPA not to commence actions under section 113 since this was a decision on 'agency action committed to agency discretion by law.' 5 U.S.C. §701(a)(2).

If, as argued by Petitioners, the EPA has the sole authority at the federal level to determine whether to criminally prosecute a permit holder, then the district court is without jurisdiction to enter judgment against the permit holder for violations of 33 U.S.C. §1319 in the absence of an EPA request for criminal prosecution. This Court spoke to this point in the context of the reviewability of an agency decision not to enforce in Heckler v. Chaney, 470 U.S. 821, 831, 84 L.Ed.2d 714, 723, 105 S.Ct. 1649 (1985). This Court stated:

> This Court has recognized on several occasions over many years that an agency's

> decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. See, United States v. Batchelder, 442 U.S. 114, 123-124, 60 L.Ed.2d 755, 99 S.Ct. 2198 (1979); United States v. Nixon, 418 U.S. 683, 693, 41 L.Ed.2d 1039, 94 S.Ct. 3090 (1974); Vaca v. Sipes, 386 U.S. 171, 182, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967); Confiscation Cases, 7 Wall 454, 19 L.Ed. 196 (1869). This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.

This Court ruled, Heckler v. Chaney, 470 U.S. at 837-838, 84 L.Ed.2d at 727 (1985):

> We therefore conclude that the presumption that agency decisions not to institute proceedings are unreviewable under §701(a)(2) of the APA is not overcome by the enforcement provisions of the FDCA. The FDA's decision not to take enforcement actions requested by respondents is therefore not subject to judicial review under the APA. The general exception to reviewability provided by §701(a)(2) for action 'committed to agency discretion' remains a narrow one, see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 28 L.Ed.2d 136, 91 S.Ct. 814 (1971), but within that exception are included agency refusals to institute

> investigative or enforcement proceedings, unless Congress has indicated otherwise. In so holding, we essentially leave to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable.

In the context of citizens suits pursuant to 33 U.S.C. § 1365, the courts have routinely held that, even though the Administrator may be required to enforce certain provisions of the Act, the method of enforcement is discretionary. DuBois v. EPA, 646 F.Supp. 741, 745 (W.D. Missouri 1986) (finding duty to enforce mandatory, but method of enforcement discretionary with Administrator); South Carolina Wildlife Federation v. Alexander, 457 F.Supp. 118, 134 (D.S.C. 1978) (Administrator's duty to enforce mandatory, but ". . . this court is not of the opinion that he is mandated to begin enforcement proceedings in the courts by initiating either a civil or criminal action."); Committee for the Consideration of the Jones Falls Sewage System v. Train, 387 F.Supp. 526, 530 (D.Maryland 1975) ("The Administrator has enforcement powers under various provision of the Act. He must be allowed to determine how a particular discharger should be proceeded against to best achieve the objectives of the Act."); Untied States v. Phelps Dodge Corporation, 391 F.Supp. 1181, 1184 (D.Arizona 1975) ("Thus, it seems clear that the bill as finally submitted and passed was intended to provide that while the Administrator must act in case of any violations, he has alternative methods of acting; i.e., either by civil or by criminal proceedings.").

By entering judgment against Petitioners without prior request from the EPA for the institution of criminal proceedings, the district court invaded the discretion of the

Administrator. The Court of Appeals for the Sixth Circuit similarly invaded this discretion in affirming Petitioners' convictions. As Congress has clearly and unambiguously placed the discretion to bring criminal enforcement proceedings within the authority of the Administrator, the courts below were without jurisdiction to enter judgment.

Respectfully, writ of certiorari should issue to review the judgments herein and to prevent future unrequested criminal proceedings from confounding the objectives of the Clean Water Act.

II. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN REFUSING TO REVERSE THE TRIAL COURT'S ORDER EXCLUDING FROM EVIDENCE CLEAR PROOF OF SELECTIVE AND VINDICTIVE PROSECUTION.

This issue was presented upon appeal and in petition for rehearing to the Court of Appeals for the Sixth Circuit. The court below erred in refusing to reverse on this issue.

Prior to the trial of this matter, Petitioners offered into evidence proof of thousands of effluent limit violations under the KPDES system, emphasizing that none of the violating permit holders had been subjected to criminal prosecution. Petitioners further offered proof of 829 discharge monitoring violations by the Louisville-Jefferson County Metropolitan Sewer District [MSD] between January, 1989 and January, 1993. The United States moved the court in limine to exclude this evidence from trial, offering proof of only two prior civil prosecutions for KPDES violations which were initiated by

the United States Attorney's Office at the direct request of the EPA. One of these civil actions was against MSD in 1977; no proof was offered as to any sanction against MSD from 1989 through 1993. In granting the United States' motion, the district court erred.

In United States v. Bustamonte, 805 F.2d 201, 202 (C.A.6 1986), the Court of Appeals for the Sixth Circuit adopted the majority standard for selective prosecution. The Court stated:

> Accordingly, it has been held that a defendant asserting selective prosecution:
>
> ... bears the heavy burden of establishing, at least prima facie, (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution and (2) that the government's discrimination of him has been invidious or in bad faith, i.e. based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights. Citations omitted.

The trial court excluded, pursuant to the United States' motion in limine, Petitioners' evidence of thousands of violations contained in discharge monitoring reports submitted pursuant to the KPDES system. The United States offered no proof of other criminal prosecutions under the Clean Water Act.

Petitioner Lawson has twice before been subject to

prosecution by AUSA Ream. In 1989, Ream prosecuted Lawson with regard to a minor infraction involving the destruction of foliage on Corps of Engineers property at Rough River, Breckinridge County, Kentucky (Citation No. AH883). Upon proof that the property actually belonged to Petitioner Lawson, this charge was dismissed. AUSA Ream again prosecuted Petitioner Lawson in 1992 (Citation No. A587634) for a minor infraction involving the placement of a utility building on Corp of Engineers property at Rough River, Kentucky. The current prosecution is, at least prima facie, "invidious."

In United States v. Andrews, 633 F.2d 449, 454 (1980), the Court of Appeals for the Sixth Circuit interpreted this Court's decision in Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). The lower court stated:

> We emphasize that Blackledge does not require that a defendant show that a prosecutor was actually vindictive. Blackledge's proscriptions are triggered where a defendant shows that there is a realistic likelihood that a prosecutor acted vindictively. There are sound reasons for this. First, this takes into account the due process value that defendants be 'freed of apprehension of such a retaliatory motivation' on the part of a judge or prosecutor. Blackledge, supra, 417 U.S. at 28, 94 S.Ct. at 2102, quoting [North Carolina v.] Pearce, [395 U.S. 711, 725, 89 S.Ct. 2072, 2080, 23 L.Ed.2d 656 (1969)]. Second, such a standard is the only realistic way to police vindictiveness. As the Court

> noted in Pearce, supra at 724 n.20, 89 S.Ct. at 2080 n.20, 'the existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case. Third, there is an important policy consideration. Prosecutors and criminal defendants are adversaries and prosecutors make honest mistakes. If the standard to be applied was proof of actual vindictiveness, a trial judge would have the Hobson's choice of either not barring the extra charge or of saying that a prosecutor acted wrongly. In some cases, a trial judge would, in effect, be calling the prosecutor a liar where the prosecutor claimed inadvertence and the judge ruled against him. We do not think that such confrontations before the judiciary and the executive branch are desirable. A standard of 'realistic likelihood of vindictiveness' allows the barring of charges in appropriate situations without the need to find that the prosecutor acted in bad faith. Footnotes omitted.

In United States v. Anderson, 923 F.2d 450 (6th Cir. 1991), cert. denied, 499 U.S. 980, 111 S.Ct. 1633, 113 L.Ed.2d 729, cert. denied, McNeil v. U.S., 111 S.Ct. 2062, 114 L.Ed.2d 467, the Court of Appeals set the "rule of law" for vindictive prosecution in the Petitioners' circuit. The lower court stated:

> A prosecutor vindictively prosecutes a person when he or she acts to deter the exercise of a protected right by the person prosecuted. United States v. Andrews, 633

> F.2d 449, 453-55 (6th Cir. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1382, 67 L.Ed.2d 358 (1981). A person who claims he has been vindictively prosecuted must show that the prosecutor has some 'stake' in deterring the petitioner's exercise of his rights, and that the prosecutor's conduct was somehow unreasonable.

Anderson, supra., does not require the Petitioners to define what the prosecutor's "stake" is, but only to establish that he does have one. Petitioners have established at least a "realistic likelihood of vindictiveness" in that AUSA Ream has made two prior unsuccessful attempts at prosecution for unsubstantial violations. Second, and most concerning, AUSA Ream initiated this prosecution without prior request from the EPA. Third, the penalties sought by AUSA Ream in this prosecution are so greatly disproportionate to the alleged wrong that vindictiveness is apparent.

As is argued herein, AUSA Ream's conduct in seeking the prosecution of the Petitioners without prior request from the EPA was unreasonable. Both prongs of the Anderson and Andrews standards have been met.

A comparison of published cases to Petitioners' case demonstrates that AUSA Ream's conduct in prosecuting the Petitioners' was unreasonable due to the great disparity between the degree of penalty in this case and that in other cases. The vast majority of published decisions involve EPA compliance on dues or civil fines. In Southern Ohio Coal Company v. Office of Surface Mining, Reclamation and Enforcement, Department of the Interior, 20 F.3d 1418, 1420 (6th Cir. 1994), rehearing with

suggestion for rehearing en banc denied (1994), at issue was the discharge of "an estimated one billion gallons of water . . . . [which] contained levels of iron over 100 times the legal limit as well as excessive levels of zinc, manganese and copper." In Southern Ohio Coal Company, the Commonwealth of Kentucky had approved an emergency removal plan which would have allowed the mining company discharge of this water directly into surrounding creeks and streams, even though this was known to be fatal to all aquatic life in the area. Even though the EPA challenged the plan, no criminal penalty is discussed. Similarly, in USI Properties Corp. v. EPA, 517 F.Supp. 1235, 1237 (D.Puerto Rico 1981), the EPA issued a cease and desist order, not criminal punishment, in a case involving the pumping of "110,000 gallons of water per minute" off of an area determined to be protected wetlands.

At the trial of this matter, the United States offered absolutely no proof of environmental harm from the Spanish Cove facility. Yet, Petitioner Lawson has served six months in federal prison and is still potentially subject to substantial fines.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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